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In the Supreme Court of the United States

OCTOBER TERM, 1956

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LION OIL COMPANY AND MONSANTO CHEMICAL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court below (R. 249–255) is reported at 221 F. 2d 231. The findings of fact, conclusions of law, and order of the Board (R. 145–187, 205–219) are reported at 109 NLRB. 680.

JURISDICTION

The decree of the court below (R. 255–256) was entered on April 22, 1955. The petition for a writ of certiorari was filed on July 15, 1955,

[1] On June 11, 1956, this Court entered an order joining Monsanto Chemical Company as a party respondent in these proceedings in view of Lion Oil's merger into that company.

and granted on March 12, 1956 (R. 256). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1) and Section 10 (e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Section 8 (d) (4) of the National Labor Relations Act, as amended, provides that a party who wishes to modify or terminate a collective bargaining contract must "continue * * * in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice [of his wish to modify or terminate] is given or until the expiration date of such contract, whichever occurs later."

The question presented is whether the requirement of this Section is satisfied where a contract provides for negotiation and adoption of modifications at an intermediate date during its term, and a strike in support of modification demands occurs after the date on which such modifications may become effective—and after the 60-day notice period has elapsed—but prior to the terminal date of the contract.[2]

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[2] The question stated in the text is the only one presented for review by our petition for certiorari. However, respondent Lion Oil Company argued in the court below, and suggested in its brief opposing certiorari (p. 4), that the Board's order was erroneous because the strike involved was violative of its collective bargaining agreement with the Union. We discuss this alternative contention at pp. 47–52., *infra*.

STATUTE INVOLVED

The statutory provision principally involved, Section 8 (d) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), appears in the Appendix, *infra*, pp. 54–56.

STATEMENT

A. The Board's findings of fact

Lion Oil Company and the Oil Workers International Union, CIO, bargained together and entered into a series of collective agreements during the years following 1944, when the Union was certified by the Board as the representative of the Company's employees (R. 148). The agreement involved in the present controversy, effective October 23, 1950, provided in pertinent part as follows (R. 28–29):

> This agreement shall remain in full force and effect for the period beginning October 23, 1950, and ending October 23, 1951, and thereafter until canceled in the manner hereinafter in this Article provided.
>
> This agreement may be canceled and terminated by the Company or the Union as of a date subsequent to October 23, 1951, by compliance with the following procedure:
>
> (a) If either party to this agreement desires to amend the terms of this agreement, it shall notify the other party in writing of its desire to that effect, by registered mail. No such notice shall be given prior to August 24, 1951. Within the period of 60 days, immediately following the date of the receipt

of said notice by the party to which notice is so delivered, the Company and the Union shall attempt to agree as to the desired amendments to this agreement.

(b) If an agreement with respect to amendment of this agreement has not been reached within the 60-day period mentioned in the sub-section immediately preceding, either party may terminate this agreement thereafter upon not less than sixty days' written notice to the other. Any such notice of termination shall state the date upon which the termination of this agreement shall be effective.

On August 24, 1951, in accordance with the foregoing contract provision, the Union served written notice on the Company of its "desire to modify the collective bargaining contract" then in effect (R. 150; 81–82). Copies of the notice were sent to the Federal Mediation and Conciliation Service and the State Labor Commissioner of Arkansas for the express purpose of conforming with the requirements of Section 8 (d) (3) of the Act (R. 150; 81–82, 102).[3]

[3] Section 8 (d) (3), which appears in full in the Appendix, *infra*. p. 55, provides that, in fulfillment of the statutory duty to bargain collectively, an employer or labor union desiring to modify or terminate an existing contract must, after giving notice of this desire to the other party, notify "the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith [notify] any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time."

The Union attached to its notice a list of "some of the proposed changes" it wished to negotiate in the existing contract (R. 150; 82–94). These proposals dealt with (1) modifications in the details of the existing contract clauses covering, *inter alia*, grievance procedure, work classification and seniority, (2) an increase in wage rates and liberalization of existing employee benefits, and (3) a suggested employee savings plan (*ibid.*). Negotiations began in August, shortly after the Union served its notice, and continued through the fall and winter (R. 150–151, 167–168, 15–16). Neither party notified the other, following October 23, 1951, when the contract became subject to termination, that it wished to end the contract (R. 150; 24). On February 14, 1952, however, no agreement having been reached, the employees voted to strike in support of the contract modifications which had been proposed by the Union and rejected by the Company (R. 150–151; 102–103). The proposed strike was originally set for March 3, 1952, and the Company was given notice accordingly. Negotiations continued, however, and in the hope that agreement would be reached, the strike was postponed three times before it finally went into effect on April 30, 1952 (R. 151; 16, 103–104, 106–107). When the strike began, the bargaining issues had narrowed, disagreement remaining principally with respect to wages, a no-strike clause, and a provision for a money

payment in lieu of notice when layoffs were made (R. 168–169; 106–107).

The strike was supported by all rank-and-file employees, but the Company continued to operate part of its plant with supervisory, clerical, and technical personnel (R. 151; 21, 139–140). No attempt was made to replace the strikers with new employees. Throughout the strike the Union and the Company continued negotiations, frequently with the help of the Federal Conciliation Service, looking toward agreement for amending the contract and settling the strike (R. 167–168, 170; 16).

Following several weeks of the strike during which no apparent progress was made toward settling the strike issues, the Union, at a meeting with the Company on June 21, 1952, announced that it "was offering to return all the strikers unconditionally, and wanted to know what schedule they should report on with no strings attached" (R. 153, 155; 134, 128, 110, 144, 94–95). The Company declined the offer, however, and took the position that the employees could not return to work until the Company's contractual terms were met (R. 153–155; 99–100, 111, 134, 18).

In accordance with the Union's offer to end the strike, large numbers of the employees applied both singly and in groups at the plant gate or by telephone for reemployment (R. 156; 116, 120–121). The plant superintendent interviewed many of the applicants, and rehired some upon

condition, individually assented to by those who were reinstated, that each would "continue to come to work daily and continuously throughout the period of the remainder of the strike" and would not honor any picket line at the Company's plant (R. 216; 120, 122, 123, 18–19).

Negotiations for a modified contract continued after June 21 as before (R. 173, 176; 115, 135–138). During July, however, as the parties progressed toward agreement, the Company announced that its execution of a new contract would be conditioned on withdrawal by the Union of the unfair labor practice charge in this case (R. 175–176; 130–132, 135–137). The Company receded from this position on July 30, and shortly thereafter, on August 3, 1952, accord was finally reached on all disputed issues and the agreement was formally executed (R. 176–177; 115–116). The Company's employees were reinstated the following day, and the plant resumed full production soon thereafter (*ibid.*).

B. The Board's conclusions and order

The Board concluded upon the foregoing facts that the Company had violated Section 8 (a) (1), (3) and (5) of the Act when "it rejected the Union's attempts to get the strikers back to work, but at the same time individually interviewed the strikers and reinstated them upon their assurance that they would not strike" (R. 216–217). This conduct, in the Board's view, "required em-

ployees, as a condition of employment, to give up their adherence to the Union as their bargaining representative" and to deal with the Company as individuals; accordingly, it constituted both discrimination "violative of the Act, as to the strikers who continued to adhere to the lawful bargaining position of their statutory representative" (*ibid.*), and a refusal to accord full recognition to the Union as the employees' bargaining representative, as required by the Act. In addition, the Board concluded that the Company's conditioning of the execution of a contract upon the withdrawal by the Union of an unfair labor practice charge filed with the Board constituted a refusal to bargain in good faith, in violation of Section 8 (a) (5) of the Act (R. 217).

In reaching these conclusions, the Board rejected the Company's defense that the strikers had lost their status as employees and the protection of the Act because they had struck while a contract was in effect and therefore in contravention of the requirement of Section 8 (d) of the Act that no strike in support of contract modifications take place "for a period of sixty days after * * * notice [of the proposed modifications] or until the expiration date of [the existing] contract, whichever occurs later." The Board determined that the "expiration date" of a contract, as the term is used in Section 8 (d), comprehends "an agreed date in the course of

[the contract's] existence when the parties can effect changes in its provisions" (R. 211). Since in this case the contract was open to modification on October 23, 1951, and since the Union gave notice of a desire to negotiate modifications precisely 60 days before that time, and did not strike until several months thereafter, the Board concluded that the requirements of Section 8 (d) had been satisfied, so that the striking employees had not lost their protected status as employees under the Act.[4]

To remedy the unfair labor practices thus found, the Board's order (R. 217–219) requires the Company to cease and desist from discouraging membership in the Union by discriminatorily refusing to reinstate its employees, from refusing

[4] Two Board members stated differing views of the meaning of Section 8 (d) in separate opinions. Member Peterson, concurring with the majority in result, adopted the earlier view of the Board that Section 8 (d) permitted strikes in support of contract changes at any time during a contract after 60 days' notice (R. 219–222). See *Wilson & Co.*, 89 NLRB 310. Member Murdock dissented (R. 222–238). In his view, Section 8 (d) is applicable only during the period around the termination of a contract. Accordingly, he concluded in this case that since the contract at the time of the strike was terminable by either party, Section 8 (d) (4) required fulfillment at that time of the procedures outlined in Section 8 (d) (1) through (3) before a strike could lawfully be called. Finding that the Union had failed to give the notices there required when it decided to strike, Member Murdock concluded that the strike was forbidden by Section 8 (d), and that the strikers therefore lost their protected status under the Act. These views are discussed *infra*, pp. 43–47.

to bargain with the Union as the representative of its employees, and from in any other manner interfering with its employees in the exercise of the rights guaranteed them in Section 7 of the Act. Affirmatively, the Board's order requires the Company to make whole its employees who were refused reinstatement for any loss of pay suffered by reason of the discrimination against them, and to post appropriate notices.

C. The decision below

The court below did not reach the merits of the Board's unfair labor practice findings. In its view, the strike failed to satisfy the requirements of Section 8 (d), with the consequence, as provided in that Section, that the strikers lost their status as employees under the Act and therefore the protection otherwise afforded them against the unfair labor practices of which they complain (R. 253–255).

The court emphasized that the 60 days' notice given by the Union (on August 24, 1951) of its desire to modify the existing contract did not have the effect of terminating the contract. According to the court, and in this respect the Board decision was in full agreement, the contract by its terms became one of indefinite duration following the lapse of the 60-day notice period on October 23, 1951, and was in full effect

at the time of the strike. Turning, then, to the application of Section 8 (d), the court rejected the construction given that provision by the Board; instead, it read the statutory language to prohibit strikes during the life of a contract regardless of any reopening provision of the contract. To reach this conclusion, the court construed the phrase "expiration date" in Section 8 (d) to be synonymous with "termination date." The construction thus given Section 8 (d) was the one given by the same court in *Local No. 3, United Packinghouse Workers of America* v. *National Labor Relations Board,* 210 F. 2d 325, certiorari denied, 348 U. S. 822, which was relied upon in the opinion in this case. Since it was clear that the contract in the present case had not terminated, it followed from the court's reasoning that the strike fell within the ban of Section 8 (d), and that the strikers therefore lost the protection which they would otherwise have enjoyed under the Act against the commission of unfair labor practices by their employer.

Having ruled that the strikers were excluded by Section 8 (d) from the protection of the Act, the court below did not have occasion to treat the Company's alternative contention that, irrespective of Section 8 (d), the strike was in breach of the existing collective bargaining agreement, and thus the strikers were not entitled to reinstatement.

SUMMARY OF ARGUMENT

I

It is the Board's position that the prohibition contained in Section 8 (d) (4) against strikes for contract changes "for a period of sixty days after such notice [of the proposed changes] is given or until the expiration date of such contract, whichever occurs later," does not illegalize such strikes during the term of a contract where (1) the date provided by the contract for its modification has lapsed and (2) the notice and waiting provisions have been satisfied prior to that date. In holding to the contrary, that the phrase "expiration date" in this section precludes strikes until an existing contract has in fact ended, irrespective of whether the contract contains a provision for mid-term amendment, the court below adopts a narrowly literal construction which is out of keeping both with the usage of the same phrase in other parts of the same statutory provision and with the Congressional purpose in enacting Section 8 (d). Moreover, the lower court's interpretation is productive of "incongruous results," which, as this Court has recently warned, are to be avoided in determining the meaning of Section 8 (d). *Mastro Plastics Corporation* v. *National Labor Relations Board*, 350 U. S. 270, 286.

A. The term "expiration date," following which the ban against strikes in Section 8 (d) (4) is lifted, is used in Section 8 (d) (1) in a

context that makes clear that it encompasses a date provided by a contract for modifications to be made effective during its term. Thus, in Section 8 (d) (1) this phrase describes the date before which the 60-day notice period is measured. Where a party wishes to modify a contract pursuant to a reopening clause, this phrase requires notice to be given 60 days before the proposed modifications may become effective, not 60 days before the termination of the contract. That the notice under Section 8 (d) (1), required 60 days before the "expiration date," applies to proposed contract amendments to be made during the contract term is shown by the statutory wording, its purpose and its legislative history.

Recurrence of the identical phrase "expiration date" in Section 8 (d) (4) should require that the same meaning be given it which it has in the earlier subsection of the same statutory provision. And applying that meaning in this case, the ban against strikes until after the "expiration date" of the existing contract between the Union and the Company did not illegalize the Union's strike here. For the Union gave the required notice 60 days before the date upon which modifications could be made effective under the contract, and the strike occurred long after that date.

B. Section 8 (d), which represents a Congressional effort "to bring about the termination and modification of collective bargaining agreements

without [strikes]," must be read in the light of the coordinate Congressional purpose "to insure freedom of concerted action by employees at all times." *Mastro Plastics Corporation* v. *National Labor Relations Board*, 350 U. S. 270, 284. In this light, it is apparent that the purpose of this Section was not to outlaw generally strikes in support of contract changes, but to ban them only during periods governed by contractual provisions or during which the 60-day notice and negotiation provisions are applicable. Although the question was not specifically considered in the committee reports or the Congressional debates pertaining to Section 8 (d), the references which are there made to the restricted character of its strike prohibition appear to assume that strikes would be permitted after the expiration of the period during which negotiations are required under a reopening clause. Moreover, the Joint Committee, established to study the operation of the Act, made clear in its report filed in 1948 that it was the intent of Congress to permit such strikes, and recommended that Section 8 (d) be amended to remove any ambiguity in this respect. Similarly, Senator Taft in 1949 proposed a clarifying amendment to the same effect, not to make any substantive change, but because he feared that the Congressional intent was "not clear that a strike after 60 days' notice under an annual reopening clause of a contract running for more than one year would not constitute a violation."

C. In requiring notice and negotiations with respect to proposed contract modifications to be made effective during the contract term, Congress intended to make applicable the normal principles of collective bargaining adopted by the Act. It has long been recognized by the courts that the right to strike in support of contract proposals is indispensable to the practice of collective bargaining which Congress has required in the Act, and specifically in Section 8 (d) with respect to mid-term contract modifications. To outlaw strikes in such bargaining negotiations, which the court below construes Section 8 (d) to have done, would thus subvert the very principle which that Section purports to implement. The Board's reading of Section 8 (d), on the other hand, fully harmonizes the right to strike with the Act's regulation of the bargaining relationship. Strikes are curtailed only during the periods in a contract when modifications may not be made, and are permissible, after the 60-day waiting period, when renegotiation is appropriate and bargaining is mandatory.

D. Not a single member of the Board accepted the interpretation of Section 8 (d) announced by the court below. However, the Board was not unanimous. There was a concurring opinion (Member Peterson) and a dissent (Member Murdock), both of which would construe Section 8 (d) as being in general less restrictive of the right to strike than it is under the majority's in-

terpretation, and *a fortiori* less restrictive than it is as read by the court below. We believe that neither of these alternatives fully explains the statutory language or effectuates the legislative purpose. The suggestion in the concurring opinion that Section 8 (d) requires only a 60-day notice and negotiation period before a strike may be called fails to explain the "whichever is later" phrase in cases where the notice is given more than 60 days prior to the modification or termination date of the contract. The dissenting view, limiting the application of Section 8 (d) to periods around the end of the contract term, gives no effect to the language showing that the 60-day notice and its concomitant strike ban was designed to apply when reopening and modification was contemplated by the contract as well as during the period immediately preceding the termination date.

II

The court below did not reach the Company's alternative contention that, apart from Section 8 (d), the strike in this case was in breach of the existing contract and that the employees were therefore not entitled to the Act's protection against unfair labor practices. This argument is without merit. The strike was not in violation of the contract, which contained no agreement not to strike. Whatever implied obligation there may be not to strike against the continued

enforcement of existing contract terms (*National Labor Relations Board* v. *Sands Manufacturing Co.*, 306 U. S. 332), that obligation does not extend to a strike, like the one here, in support of contract changes at a time when the contract specifically provides that such changes may be made.

ARGUMENT

I

SECTION 8 (D) OF THE NATIONAL LABOR RELATIONS ACT DOES NOT FORBID A STRIKE, DURING THE TERM OF A CONTRACT, IN SUPPORT OF CONTRACT MODIFICATIONS FOLLOWING THE DATE PROVIDED BY THE CONTRACT FOR THE NEGOTIATION OF SUCH MODIFICATIONS

It is not disputed that the strike which began on April 30, 1952, occurred at a time when a collective bargaining contract was in effect between the Company and the Union. The contract conditioned its termination upon 60 days' notice following October 23, 1951, and since neither party gave such notice, the contract thereafter became one of indefinite duration and remained in effect when the Union struck. The contract also provided, however, for reopening during its term for the purpose of modifying its provisions on or after October 23, 1951, and it was in support of the Union's proposals for such modifications that the strike was finally called after lengthy negotiations had failed to produce agreement.

The relevant portions of Section 8 (d), by which the legality of a strike in these circumstances is to be determined, are as follows:

> * * * where there is in effect a collective bargaining contract * * * no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification
>
> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
>
> (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modification;
>
> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and
>
> (4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of

such contract, whichever occurs later * * *.

Section 8 (d) further provides that—

> Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute for the purposes of Sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

The foregoing provisions were designed to provide "an orderly method for the modification or termination of existing agreements by proscribing, during the sixty day cooling off period, strikes which interfere with the operation of the statutory method, *i. e.*, strikes to compel termination of the agreement or modification of its terms." *Wagner Iron Works* v. *National Labor Relations Board*, 220 F. 2d 126, 141 (C. A. 7), certiorari denied, 350 U. S. 981.

On August 24, 1951, when the Union, in conformity with the existing contract, served notice upon the Company that it wished to modify some of the contract terms, it also notified the federal and state mediation and conciliation services, and at once undertook negotiations with the Company with respect to its proposals, thus satisfying the requirements of Section 8 (d) (1), (2), and (3), *supra*. The further requirement of Section 8 (d) (4)—that no strike be called "for a period

A. The meaning of "expiration date" as determined from its statutory context

A significant guide to the meaning of the phrase "expiration date" in Section 8 (d) (4) is the usage of the identical phrase in Section 8 (d) (1), in a context that leaves no doubt as to the scope of its reference. Section 8 (d) (1) (*supra*, p. 18) requires a party to a contract who, like the Union in this case, wishes to modify its terms, to serve "written notice upon the other party to the contract of the proposed * * * modification sixty days prior to the *expiration date* thereof" (emphasis added). Under Section 8 (d) (1) this notice requirement applies where, as here, a contract is sought to be modified during its term, as well as where a contract is sought to be terminated and a new contract negotiated. See pp. 23–26, *infra*. It seems clear, therefore, that in the former situation Section 8 (d) (1) refers to the 60-day period before the date on which the reopening clause provides for modifications to be put into effect.

For example, in the case of a two-year contract subject to reopening at the end of a year, the "expiration date" by which the notice requirement of Section 8 (d) (1) is measured necessarily includes the date at the end of the first year on which contract changes may be made; were "expiration date" to refer solely to the termination date of the two-year contract, in conformity with the meaning given by the court below to

the same phrase when used in Secton 8 (d) (4), notice would be required some ten full months *after* modifications were intended to be made effective. Section 8 (d) may not be read to produce such an "incongruous effect." *Mastro Plastics* case, 350 U. S. at 286.

Similarly, in the contract in this case, the "expiration date," 60 days before which the parties were required by Section 8 (d) (1) to give notice of an intent to modify the contract during its term, pursuant to the contract modification clause, was October 23, 1951, some six months prior to the strike. This is not to say that the term "expiration date" does not refer also to the termination date of a contract, but rather that it refers in addition to the date on which the parties have agreed that either some or all of the terms of an existing contract may expire and be replaced by other terms.[6]

The validity of our assumption that the Section 8 (d) requirements apply to negotiations for modifications during the contract term as well as to negotiations leading to termination of the contract has been attested by this Court. In *Mastro Plastics Corp.* v. *National Labor Relations Board, supra,* 350 U. S. at 286, the Court stated

[6] It should be observed that Section 8 (d) does not permit a shortening of the sixty-day "cooling-off" period by giving notice less than 60 days before the termination or modification date of a contract. Strikes are in any event suspended for 60 days following notice, and, of course, may be barred for a longer period if the "expiration date * * * occurs later."

that Section 8 (d) was applicable where there is a "request to modify the contract," and it is well known that parties to collective bargaining agreements frequently provide for such modifications to be made during the term of a contract. See pp. 41–42, *infra*.

The correctness of the Court's observation is demonstrable in a number of ways. Thus, the language of Section 8 (d) itself repeatedly makes clear, in the introductory sentence to the proviso and in both subsections (1) and (2), that the procedures there described are prerequisites to contract "termination or *modification*" (emphasis added). Similarly, the last paragraph of Section 8 (d) provides that subsections (2), (3) and (4) do not mean that parties need discuss "any *modification* of the [contract's] terms * * * if such *modification* is to become effective before such terms * * * can be reopened under the provisions of the contract" (emphasis added). By the same token, the duty to bargain, and the corollary power to strike, clearly subsist when the contract provides for reopening and modification during its term.[7] Moreover, subsection 3

[7] It bears emphasis that an agreed date in a collective bargaining agreement on which modifications may be sought is a familiar and highly meaningful provision of such agreements. It is clear, of course, as a matter of general contract law, that both parties to an agreement may agree to modifications at any time. Under the National Labor Relations Act, however, there is a duty to bargain collectively during the term of a contract when the terms "can

provides for notice of any contract dispute to federal and state conciliation agencies. It seems reasonable to assume that Congress did not intend the procedures for effective mediation to apply only at termination, but rather intended them to apply whenever the terms of an agreement were subject to modification. Taken together, all of these provisions show that the requirements of Section 8 (d) apply where modifications are sought before the "termination" of the contract but in accordance with contract terms. Nothing in the statutory scheme points to the opposite conclusion.

Confirmation of this point is found in the legislative history of Section 8 (d). Both the House Conference Report[8] and Senate Report[9] state that the notice requirements were intended

be reopened under the provisions of the contract" (Section 8 (d), *supra*). Thus, at such times either party may require negotiations for contract changes even though the other party may prefer to continue the existing contract terms. As we show below (pp. 35–43), the Union's ability to strike is an essential ingredient of the bargaining process, long recognized as such by Congress. But under the decision below, even though the Act contemplates and requires bargaining when the contract terms permit reopening for modifications, the strike weapon is proscribed, not only for the unquestioned sixty-day "cooling off" period, but for an indefinite period beyond to the termination date of the contract. This incongruity, coupling the bargaining requirement with an insuperable barrier to effective bargaining, goes far to refute the conclusion of the court below and to sustain the contrary views of the Board.

[8] H. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 34–35.

[9] S. Rep. No. 105, 80th Cong., 1st Sess., p. 24.

to apply where contract modifications were sought as well as where a contract was sought to be terminated. And consistent with these expressions, Senator Ball, a proponent of Section 8 (d), stated on the Senate floor that this provision "means giving at least 60 days' notice of the termination of the contract, *or of the desire for any change in it* * * *." 93 Cong. Rec. 5014 (emphasis added).

If, as we have shown, the phrase, "expiration date" as used in Section 8 (d) (1) refers, in situations where contract modification rather than termination is sought, to the date provided by the contract for modification, it scarcely can be given another meaning as applied in the identical situation where the question is whether the "expiration date" of the contract has passed so as to legitimize a strike under Section 8 (d) (4). Recurrence of the same phrase within the same statutory section normally requires identical construction. *Pampanga Mills* v. *Trinidad,* 279 U. S. 211, 218. Applying a consistent meaning to the term "expiration date" as it is used in Section 8 (d), it seems plain that the Union's strike was not forbidden by 8 (d) (4); the requirement that there be no strike for contract modifications until after the "expiration date" of the contract was fulfilled when the Union gave sixty days' notice before, and delayed its strike until after, October 23, 1951, the date upon which modifications could be made effective under the contract.

It should be added that the Board's construction of the term "expiration date"—to include an intermediate point during the life of a contract when, under its terms, it is open to renegotiation, as well as the time at which the contract terminates—is fully consistent with the differing, rather than interchangeable, uses of the terms "expiration" and "termination" throughout Section 8 (d). "Termination" is used exclusively in conjunction with "modification," in order to designate the two occasions with respect to which the requirements of Section 8 (d) are imposed. In fixing the time following which strikes may be called to support bargaining demands, however, the statute does not speak of the "termination" of the contract, which elsewhere has been specifically used to denote the end of the contract term; instead, the statute speaks of the "expiration date," which, as shown, is used elsewhere to denote both the date during the contract when it is subject to modification and the contract's terminal date. This significant difference is overlooked by the court below in giving a meaning to "expiration date" without regard to its statutory context. Cf. *Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 258.

It may also be pointed out that to accept the interpretation of Section 8 (d) adopted by the court below would create a most anomalous situation in the application of that portion of Section 8 (d) which states that "Any employee who en-

gages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee * * *." The conclusion of the court below, that Section 8 (d) outlaws all strikes for contract changes during the life of a contract, would have to stand side by side with a provision which, if read literally, imposes penalties to enforce this general prohibition only where such a strike occurs during the sixty-day period following notice of an intent to terminate; under a literal interpretation, strikers either before or after such period would retain their employee status even though a contract was still in existence. But see *Snively Groves, Inc.*, 109 NLRB 1394; and see Note, 64 Yale L. J. 248, 251. Such an inconsistency between the substantive statutory provision and its sanction can be avoided only by adopting a more meaningful guide to Congressional intention than the literal meaning of words read in isolation from each other. Cf. *Pickett* v. *United States*, 216 U. S. 456, 461.

B. The meaning of "expiration date" as determined from the legislative purpose of Section 8 (d)

As we have shown, the term "expiration date" serves the coordinate purposes of (1) fixing the date for giving notice of a proposal either to terminate or to modify a contract (Section 8 (d) (1)), and (2) signifying the date after which there may be a strike in support of contract changes (Section 8 (d) (4)). These provisions reflect a Congressional effort to promote peaceful

renegotiation of contracts by restricting the statutory right to strike in support of contract demands "during this natural renegotiation period." *Mastro Plastics Corp.* v. *National Labor Relations Board, supra,* 350 U. S. at 286. As stated by this Court (*id.*, at 284):

> Here again the background is the dual purpose of the Act (1) to protect the right of employees to be free to take concerted action as provided in Sections 7 and 8 (a), and (2) to substitute collective bargaining for economic warfare in securing satisfactory wages, hours of work and employment conditions. Section 8 (d) seeks to bring about the termination and modification of collective-bargaining agreements without interrupting the flow of commerce or the production of goods, while §§ 7 and 8 (a) seek to insure freedom of concerted action by employees at all times.

Section 8 (d) thus makes no attempt to outlaw generally strikes in support of contract changes, the right to which action plays a recognized and indispensable role in collective bargaining (*infra,* pp. 35–43). But "once parties have stabilized their bargaining relationship by entering into a contract," it precludes such strikes until there have been sixty days of negotiations (R. 207–208). See *National Labor Relations Board* v. *Jacobs Mfg. Co.,* 196 F. 2d 680, 684 (C. A. 2). Specifically, then, the purpose of 8 (d) (4) was to ban strikes and lockouts only during the period when

contracts forbade either modification or termination. This purpose is fulfilled by reading the Section, as the Board does, to forbid strikes during periods governed by set contractual provisions, and to allow strikes, following notice and negotiations, during periods when changes may be effected under the contract.

To postulate more and outlaw all strikes during the term of a contract in support of contract changes, irrespective of the presence of a reopening clause, not only exceeds the plain purpose of Section 8 (d), but, as we show below, pp. 35–43, seriously derogates from the practice of collective bargaining as contemplated by the Act. Nothing in the legislative history of Section 8 (d) warrants such a result. Although neither the committee reports nor the Congressional debates pertaining to Section 8 (d) deal explicitly with the question of a strike resulting from a contract dispute arising out of a reopening provision, it appears to have been assumed that the ban against strikes would be lifted upon expiration of the period during which negotiations are required. Thus, the Senate Report describes the restriction on strikes contained in Section 8 (d), which originated in the Senate bill, as making it "an unfair labor practice by a union to strike before the expiration of the 60-day period." S. Rep. No. 105, 80th Cong., 1st Sess., p. 24. As we have shown (*supra*, pp. 25–26), and as the Senate Report itself makes clear, the 60-day notice provision is applicable to

clauses permitting "notice by either side of a desire to * * * modify" (*ibid.*), whether or not the contract remains in effect. Accordingly, the 60-day period following which the Senate Report assumes the existence of a right to strike may well lapse, as it did in this case, while the contract continues in existence. To the same effect as the Senate Report is the statement on the floor by Senator Ball, a leading proponent of Section 8 (d), that "ours is a very mild provision, which merely says to unions, 'You must have a 60-day reopening clause in your contract.'" 93 Cong. Rec. 7530. See also *id.*, 5014.

Senator Taft's remark on the floor of the Senate (R. 254–255), that the "waiting period" to strike under Section 8 (d) (4) was for "the life of the contract itself" (referred to in *Wilson & Co.* v. *National Labor Relations Board*, 210 F. 2d 325, which is relied upon and quoted in the opinion in this case (R. 254–255)), cannot be taken as evidence of an intent to outlaw a strike of the kind involved in this case. For the context of Senator Taft's statement makes clear that he was referring to the situation where notice to *terminate* is given at least 60 days "before the end of any contract," and not to notice given pursuant to a reopening clause permitting changes to be made during the life of a contract.[10]

[10] The paragraph from the Senate Report, also quoted by the court below in the *Wilson* opinion, which stresses the importance to industrial peace of "assurance of unin-

Any doubt on this score is eliminated by later expressions from the Congress reflecting Senator Taft's and other highly authoritative views with respect to the specific problem here in question. In its final report, the Joint Committee on Labor Management Relations,[11] of which Senator Taft was a member, considered the precise question presented in this case (S. Rept. No. 986, Pt. 3, 80th Cong., 2nd Sess., p. 62):

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terrupted operation during the term of the agreement" (210 F. 2d at 332), likewise reveals no intent to prevent a strike for contract amendments pursuant to a reopening clause. For the Senate Report there addresses itself to the justification for Section 301, which provides a forum for enforcement of contracts, including, *inter alia*, no-strike clauses. S. Rep. No. 105, 80th Cong., 1st Sess., pp. 15–16. As the Court of Appeals for the Sixth Circuit has observed, "Congress considered breaches of labor contracts to be separate and distinct from unfair labor practices", and Section 301 was created for enforcement of a different policy from that reflected in Section 8 (d). *International Union of Operating Engineers Local No. 181* v. *Dahlem Co.*, 193 F. 2d 470, 474. Indeed, the House and Senate Conferees rejected a provision of the Senate bill which would have made the violation of a bargaining agreement an unfair labor practice. H. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 41–42. See also 93 Cong. Rec. 6443.

[11] This Committee was established by Section 401 of the Labor Management Relations Act, 1947, and was directed, *inter alia*, to study "the administration and operation of existing Federal laws relating to labor relations," and to report to the Senate and the House "the results of its study and investigation, together with such recommendations as to neccessary legislation * * * as it may deem advisable." The Committee's report has been cited by this Court in *United Mine Workers* v. *Arkansas Oak Flooring*, 351 U. S. at 75, n. 14, and in *American News-*

> Reading section 8 (d) as a whole seems to lead to the conclusion that the act permits a strike, after a 60-day notice, in the middle of a contract which authorizes a reopening on wages. Use of the words "or modify" and "or modification" in the proviso, and use of "or modification" in section 8 (d) (1), and the statement in the final paragraph of the section that the parties are not required to agree to any modification effective before the contract may be reopened under its terms, all seem to contemplate the right of either party to insist on changes in the contract if they have so provided. The right of the union would be an empty one without the right to strike after a 60-day notice.

Acknowledging, however, that the statutory words are "susceptible to opposing interpretation," and observing that the problem is "of extreme importance to both management and labor," the Joint Committee suggested clarifying language changes to make explicit the result it thought already contemplated by the Section. *Id.*, p. 63.

In the same vein, Senator Taft in 1949 proposed an amendment to Section 8 (d) which would have made explicit the application of its requirements to reopening clauses, and the right of unions to strike in support of their proposals for contract changes thereafter, even though the con-

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paper Publishers Association v. *National Labor Relations Board*, 345 U. S. 100, 108, n. 8.

of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later"— was also satisfied, in the Board's view, when the Union delayed its strike until both the 60-day period and the date (October 23, 1951) provided by the contract for modifications to become effective had passed, and extended negotiations had failed to bring agreement between the parties. The principal issue before this Court is the statutory construction on which this conclusion rests—specifically, the Board's reading of the limiting phrase "expiration date of such contract," prior to which Section 8 (d) (4) forbids strikes for contract modifications, to refer "not only to the terminal date of a bargaining contract, but also an agreed date [here October 23, 1951] in the course of its existence when the parties can effect changes in its provisions" (R. 211).

The decision below rests on the assumption that the statutory prohibition against strikes before the "expiration date" of a contract necessarily outlaws all strikes before the contract is in fact terminated, even where, as here, the contract provides for reopening and amendment during its term. This assumption presupposes a strictly literal identity between the terms "expiration" and "termination," without regard to the context in which the former term is used, the purpose of the provision in which it is found, or its evident meaning in other portions of the same Section. This Court has only recently pointed out, how-

ever, in holding that the unqualified usage of the word "strike" in Section 8 (d) could not be extended to include all strikes, that the "incongruous results" produced by a narrowly literal reading of that Section make such an approach an untrustworthy guide to Congressional meaning. *Mastro Plastics Corporation* v. *National Labor Relations Board,* 350 U. S. 270, 286. The unreliability of an attempt to follow a merely literal interpretation is emphasized in this case by the circumstance that the language now under consideration has been given not only the opposed meanings adopted by the Board and the court below, but totally different meaning as well. See fn. 4, *supra,* and pp. 43–47, *infra.* We do not believe it can be fairly said that any of these varying interpretations is wholly without support; it is undeniable that, as this Court observed in its treatment of the Section 8 (d) problem presented in the *Mastro Plastics* case, there is a measure of ambiguity in the statute. 350 U. S. at 287.[5] For the reasons stated below, however, we believe the Board's reading in this case best coordinates the language of the various parts of Section 8 (d) into a consistent and meaningful whole, most accurately reflects the legislative purpose, and most easily accommodates the concept of collective bargaining adopted by the Act.

[5] See, Note, *Section 8 (d) of Labor Management Relations Act as a Ban on Strikes Before Contract Termination,* 64 Yale L. J. 248; 68 Harv. L. Rev. 720; 54 Col. L. Rev. 1006; 44 Geo. L. J. 447.

tract remained in effect. S. Min. Rep. No. 99, Pt. 2, 81st Cong., 1st Sess., p. 42. Again, the amendment was offered not to change the intendment of the law, but because it was feared that the existing language did not unambiguously express that intent. As stated in the report supporting the proposed amendment, "it is not clear that a strike after 60 days' notice under an annual reopening clause of a contract running for more than 1 year would not constitute a violation * * *. [T]he amendment proposed below makes it clear that such a strike would not constitute an unfair labor practice." *Id.*, p. 27.[12]

In sum, in reading Section 8 (d) (4) to prohibit all bargaining strikes so long as a contract is in effect, the court below imposes restraints which authoritative Congressional sources have disclaimed and for which there is no support in the legislative history of Section 8 (d). The interpretation adopted by the court below fails to make the accommodation, which this Court has stated to be the purpose of Section 8 (d), between the right to strike for contract changes and the desired stability of a bargaining relationship.[13]

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[12] This proposed amendment, along with a group of others, was passed by the Senate, but did not become law. 95 Cong. Rec. 8717.

[13] "The Eighth Circuit's approach in *Packinghouse Workers* [210 F. 2d 325, which that court followed in the instant case] threatens unfortunate results. Most collective bargaining contracts have provisions which permit amendment or reopening. Although a substantial majority of

C. The right to strike for contract changes under a reopening clause is indispensable to the principles of collective bargaining embodied in Section 8 (d)

Collective bargaining—"the performance of the mutual obligation of the employer and the representative of the employees to * * * confer" with a view to "the negotiation of an agreement" covering "wages, hours, and other terms and conditions of employment" (Section 8 (d))—cannot function in the absence of economic sanctions available to both parties. If one side of the bargaining table is unable to support its proposals and oppose the demands of the other by an effective threat of resort to economic power, it is evident that terms of employment will be established by fiat, not by bargaining. On the employer's side, economic power lies in his control of the business; in the last analysis, the existence of jobs and con-

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these also contain some form of no-strike clause, almost all of them either expressly or impliedly allow the union to strike at the time of amending. *Packinghouse Workers*, by barring such strikes, destroys the effectiveness of these amending provisions. Unions may thus find themselves bound to unsatisfactory terms for much longer periods than they originally contemplated. Moreover, unions bargaining for new contracts will find long-term agreements much less satisfactory without adequate amending clauses. Rather than lose the right to strike during the course of a long agreement, many unions may bargain for short-term contracts or contracts of indefinite length, terminable upon sixty days' notice. These shorter and less secure agreements will frustrate rather than encourage the aims of uninterrupted operation and industrial stability to which the Eighth Circuit gave its approval." 64 Yale L. J. at 256 (footnotes omitted).

tinuance of operations depends on acceptance by the employees of wages and conditions to which he is agreeable. If his employees are unwilling to work on his terms he is free to replace them. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333. On the union's side, the sanction behind its demands lies in the ability of the employees concertedly to withhold their labor—the statutorily recognized and protected power to strike. *United Mine Workers* v. *Arkansas Oak Flooring*, 351 U. S. 62; *U. A. W.* v. *O'Brien*, 339 U. S. 454, 456–457. As stated by the Senate Subcommittee on Labor and Labor Management Relations of the 82nd Congress (S. Rep. under S. Res. 71, 82nd Cong., 1st Sess., *Factors in Successful Collective Bargaining* [Comm. Print] pp. 6–7):

> Looked at from the angle of the functioning of collective bargaining, the strike is the instrument which makes the parties give the greatest weight to their respective contentions in order to avoid the cost involved in a work stoppage. The strike threat, and the occasional strike itself, is the force depended upon to facilitate arriving at satisfactory settlements. Agreement normally is reached without a work stoppage because neither side wants to incur the cost of such stoppage and makes reasonable adjustments to avoid it.
>
> Thus the strike threat and the actual strike itself are instruments of bargaining * * *.

> * * * [R]eliance on collective bargaining means dependence on the possibility, even the imminence, of a strike in every collective-bargaining session. The calculation of the cost of a strike to the parties facilitates a meeting of minds without actual resort to the strike and thus performs a vital collective-bargaining function. But strikes do eventuate when the parties are willing to risk them under particular circumstances. The policy of collective bargaining then means the policy of permitting the parties "to wait it out," or as we sometimes say, "to fight it out," after negotiations across the conference table have ceased.

In one word, then, to abridge the right to strike in support of contract demands necessarily vitiates the practice of *bona fide* bargaining with respect to such demands.[14] But this is precisely

[14] See, e. g., Chamberlain, N. W., *Collective Bargaining Procedures* (Am. Council of Pub. Aff. 1944), p. 123, and *Collective Bargaining* (McGraw-Hill, 1951), pp. 237–238; Heron, *Beyond Collective Bargaining* (Stanford Univ. Press, 1948), pp. 24–31; Smith, L. J. *Collective Bargaining* (Prentice-Hall, 1946), p. 208; Miller, G. W., *Problems of Labor* (Macmillan, 1951), pp. 458–459; Warren & Bernstein, *Collective Bargaining* (Institute of Ind. Rel., Univ. of Calif., 1949), p. 27; Hartley, F. A. *Our New National Labor Policy* (Funk & Wagnalls, 1948), XIV; Isaacson, W. J., *Enforcement of Labor Agreements by Economic Action* (N. Y. Univ. 6th Annual Conf. on Labor, 1953), p. 71; Mathews, R. E., *Labor Relations and the Law* (Little-Brown, 1953), p. 563; Rosenfarb, J., *The National Labor Policy* (Harper, 1940), p. 40: Labor Committee of Twentieth Century Fund,

the result of the decision below. For, as we have noted (*supra*, pp. 23–26), Congress left no doubt in Section 8 (d) that, while bargaining may not be required at other times during the term of a contract, the duty to bargain collectively, with all that it implies, is in full force at any time when the contract provides for reopening as well as at the termination date. On either occasion, "proposed termination or modification," Congress required that the moving party give sixty days' notice and refrain from strikes or lock-outs during this period. Under the decision below, however, where such notice relates to proposed modifications, expiration of the sixty-day period means nothing; the ban on strikes or lock-outs continues until the termination date of the contract. The result is that the intended "cooling off" period of sixy days may be perpetuated for a wholly unintended period of a year or more in any given case,[15] during which the bargaining

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Striker and Democratic Government (20th Century Fund, 1947), pp. 13–14; note, 64 Yale L. J., 248, 252; note, 68 Harv. L. Rev. 720, 722; cf. Millis & Montgomery *Organized Labor* (McGraw-Hill, 1945), pp. 795–796.

[15] While the termination date in the instant case could have been set by an additional sixty-day notice, agreements of two or more years in duration commonly provide for reopening for modifications at the end of the first year. See *infra*, p. 41. In such cases, the Union would give the required sixty-days' notice prior to the agreed modification date, but, under the decision below, would be precluded from striking until the contract's "termination" date, a year or more later.

process Congress required cannot function effectively.

That Congress could have sought no such result is clear from the history of the 1947 amendments to the Act, which shows that when bargaining was contemplated and required, it was to be bargaining implemented by the long familiar weapons on both sides to which we have referred. In a statement three times recognized by this Court as an authoritative gloss on the Act (*Amalgamated Association* v. *WERB,* 340 U. S. 383, 395, n. 21; *U. A. W.* v. *O'Brien,* 339 U. S. 454, 457, n. 3; *National Labor Relations Board* v. *International Rice Milling Co.,* 341 U. S. 665, 673, n. 8), Senator Taft pointed out the interrelation between collective bargaining and the right to strike and the indispensability of the one to the other (93 Cong. Rec. 3835):

> * * * the solution of our labor problems must rest on a free economy and on free collective bargaining. The bill is certainly based upon that proposition. That means that we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions, when a contract has expired and neither side is bound by a contract. We recognize that right in spite of the inconvenience, and in some cases perhaps danger, to the people of the United States which may result from the exercise of such right * * *. So far as the bill is concerned, we have proceeded

> on the theory that there is a right to strike and that labor peace must be based on free collective bargaining. We have done nothing to outlaw strikes for basic wages, hours, and working conditions after proper opportunity for mediation.[16]

In a similar expression, the Senate Labor Committee, in a memorandum explaining the bill which subsequently became the Wagner Act, quoted with approval the following holding of the Court of Errors and Appeals of New Jersey in *Bayonne Textile Corp.* v. *American Federation of Silk Workers,* 116 N. J. Eq. 146, 172 Atl. 551, 554:[17]

> The right to organize and bargain collectively connotes the right to strike in event that such course is deemed advisable by the employees for their mutual aid or protection. The latter is an incident of, and imparts efficacy to, the former. It can-

[16] In view of the recognition here given by Senator Taft to the right to strike as an indispensable element of collective bargaining, it can scarcely be supposed that his reference to the exercise of that right when "a contract has expired and neither side is bound by a contract" was intended to imply a restriction on the right to strike in another set of circumstances, also contemplated by the Act as appropriate for bargaining, i. e., during negotiations over contract modifications pursuant to a reopening clause. See the further expressions of Senator Taft's views, quoted *supra*, pp. 33–34.

[17] Memorandum dated March 11, 1935 (reprinted in *Legislative History of the National Labor Relations Act of 1935*, (Gov't Print. Off., 1949), vol. I, pp. 1319, 1344, 1346), comparing S. 2926, 73d Cong., 2nd Sess., with S. 1958, 74th Cong., 1st Sess.

> not be that Congress intended to reserve the right of collective action, in respect of wages, and to deprive the employees of the only weapon at their command to make its exercise effective—a lawful weapon devised to secure the enforcement of a fundamental right. A construction that would deny to the employees the privilege of striking, to enforce what they conceive to be a just demand for a wage increase, would emasculate and devitalize the clause conferring the right to organize and bargain collectively. The denial of this long-established fundamental right to strike would, in effect, compel acceptance of the scale of wages fixed by the employer.

The recognition thus given by Congress to the critical role played by the right to strike in the bargaining process does no more than reflect the widespread practice in collective agreements of making special provision for the exercise of that right in support of negotiations when the contract might otherwise infringe it. Thus, recent studies show that, in the large number of contracts which provide for mid-term negotiation of modifications,[18] there "are almost always * * *

[18] The most recent study made by the Bureau of Labor Statistics indicates that out of a total of more than 1,400 contracts analyzed, covering 8,168,300 employees, 28 percent, covering 3,159,400 employees, contained reopening clauses. *Collective Bargaining Activity in 1956: A timetable of Expiration, Reopening and Wage Adjustment Provisions of Major Agreements*, B. L. S. Report No. 102 (Dept. of Labor, Bur. of Labor Stat., April, 1956).

provision[s] for suspending strike bans in event of a deadlock in negotiations."[19] Plainly, the inseparability of effective negotiations and the power to strike is one of the tenets in "the philosophy of bargaining as worked out in the labor movement in the United States" which the Act "has been considered to absorb." *National Labor Relations Board* v. *American National Insurance Co.*, 343 U. S. 395, 408, quoting *Telegraphers* v. *Railway Express Agency*, 321 U. S. 342, 346. The decision below, however, "would deprive [employees] of their most effective weapon * * * when their need for it is obvious" (*Mastro Plastics, supra*, 350 U. S. at 286), namely, to secure modification of the contract where the agreement permits such changes. It is unreasonable to attribute to Congress a purpose to impose an affirmative duty to bargain for contract modifications and at the same time to forbid the right to strike so essential to collective bargaining.

The Board's construction of Section 8 (d), unlike that of the court below, fully assimilates the right to strike into the regulation there made of the bargaining relationship, as we think Congress intended. Thus, in the Board's view, Section 8

[19] *Basic Patterns in Union Contracts*, Bureau of National Affairs, Collective Bargaining Service, 15: 325–326; 36: 301–302. See also *Personnel Management, Labor Policy and Practice: Strikes and Lockouts*, Bureau of National Affairs, 255: 181; *Work Stoppage Provisions in Union Agreements*, 74 Monthly Labor Review, pp. 273–274 (Dept. of Labor, Bur. of Labor Stat., March 1952).

(d) curtails bargaining strikes only to the extent that there is no obligation to bargain, i. e., during contract periods when modifications are not in order. Correspondingly, where renegotiation is permissible and bargaining is made mandatory, either during the term of a contract or on its termination, the Board's construction makes available to employees the right to support their position by their traditional economic sanction, without which the bargaining process is substantially drained of meaning. The accommodation thereby achieved between contract stability and the right to strike accurately reflects, we submit, the principles of collective bargaining established by the Act generally, and, as we have shown, effectuates the purpose manifested in both the legislative history and the structure of the Act.

D. The interpretation of Section 8 (d) adopted by the Board's majority is preferable to either of the separate interpretations advanced in the concurring and dissenting opinions

It is to be noted that not a single member of the Board charged with implementing and harmonizing the provisions of the Act reached the conclusion of the court below, the result of which, we have sought to show, is stultification of the bargaining process Congress envisaged. However, there was disagreement within the Board, and the views of the one concurring and one dissenting member are outlined here in the interest of a full presentation. It will be observed that both of these separate opinions, the dissent as

well as the concurrence, are found on analysis to be less restrictive of the right to strike than the opinion of the Board majority, and *a fortiori* less restrictive than the decision of the court below. In outlining these alternative approaches, we note the reasons why the conclusion of the majority is to be preferred.

1. Board Member Peterson, in his concurring opinion, suggests that Section 8 (d) does no more than establish a 60-day cooling-off period during which strikes in support of contract changes are not permitted; that apart from this limitation there is no ban against such strikes during the existence of a contract, whether or not the contract provides for modifications during its term (R. 219–221). Because the 60-day period following notice had lapsed before the Union struck in this case, Member Peterson, like the majority, finds the strike outside the prohibition of Section 8(d). His reading, however, admittedly gives no effect to the alternative phrase in Section 8 (d) prohibiting strikes during the 60-day notice period "or until the expiration date of such contract, whichever occurs later," except in the situation where the notice is given less than 60 days before the termination of the contract. If notice is given for the purpose of modifying or terminating a contract early in its term, for example, a strike in support of contract proposals would be allowed by Member Peterson as soon as the 60-day period had elapsed, even if the contract provided a

much later date for making the proposed changes. The result seems contrary to the intendment of Section 8 (d) in two respects: (1) there is no sufficient basis for limiting the applicability of the "whichever is later" phrase to the single situation where notice is given less than 60 days before the contract's end, and (2) by permitting strikes in support of contract changes during intervals when the contract itself provides for no such changes, the stability of the contractual relationship which Congress meant to protect by Section 8 (d) is impaired. See pp. 29–30, *supra*.

2. Board Member Murdock, dissenting, would restrict the application of Section 8 (d) only to the period around the termination of a contract (R. 225). Under this view, the notice requirements and proscription against strikes must be satisfied by parties wishing to make contract changes at the end of the contract period, but at no other time during the contract's existence. Applied here, this construction of Section 8 (d) brings the Union's strike within the prohibition of that provision, for it occurred at a time when the contract could be terminated upon 60-days' notice. Although it happens to work against the Union in the particular circumstances of this case, this construction is in general the least restrictive upon strikes of any which have been advanced, for under it the limitations of Section 8 (d) pertain only to a short period in the existence of a

contract. Nothing in Section 8 (d), however, so limits its application. Indeed, the express reference to occasions when parties wish to modify contracts seems to require, as we have shown, *supra*, pp. 23–26, that the restriction be held to apply to changes intended to be made during the course of, as well as at the end of, a contract. No reason is apparent why Congress should wish to require that negotiations should be in accordance with the statutory definition of collective bargaining at one time but not at the other. Moreover, as the Board majority pointed out (R. 211–212), the suggested narrowing of the strike prohibition in Section 8 (d) eliminates entirely the object of providing the same stability to bargaining relationships as that contemplated by the parties' contracts; strikes for contract changes under this reading would be permitted even without the 60-day notice, except at the end of the contract period. It seems unlikely, in view of the general purpose of Section 8 (d), that Congress meant to provide for a "cooling off" period only at the termination of the contract. As the Board also observed (R. 213), this interpretation would bring about the anomalous result that the Union "could have struck without any notice in August [1951], but, by virtue of giving the notice, and having exhausted all the mediating and negotiating requirements of Section 8 (d) [the Union] could not lawfully strike the following April."

We do not believe that either of the above-suggested alternative interpretations, or that of the court below, satisfactorily explains the language or effectuates the purpose of Section 8 (d). The Board's reading of this Section, on the other hand, gives a consistent and reasonable meaning to the phrase "expiration date" as used throughout the Section, and fully accommodates the dual Congressional purpose of preserving the right to strike where it is essential to the practice of collective bargaining and of stabilizing the bargaining relationship in accordance with the agreements which result from the bargaining process. Cf. *Mastro Plastics Corp., supra*, 350 U. S. at 284.

II

RESPONDENT'S ALTERNATIVE CONTENTION, THAT THE STRIKE IN THIS CASE VIOLATED THE EXISTING CONTRACT, IS WITHOUT MERIT

The Company contended both before the court below and in its opposition to the petition for certiorari that, irrespective of the application in this case of Section 8 (d) of the Act, the employees were not entitled to the Act's protection against unfair labor practices because their strike was in breach of the existing collective bargaining agreement. The court below did not reach this question since it held that the strike was prohibited by Section 8 (d) of the Act. Anticipating the Company's alternative argument here, we think its error may be briefly demonstrated.

In essence, the Company's contention is that a strike for contract modifications necessarily constitutes a repudiation of an existing contract, regardless of the absence, as in this case, of a no-strike clause, and thus deprives the strikers of protection against the commission of unfair labor practices. This Court's decision in *National Labor Relations Board* v. *Sands Manufacturing Co.*, 306 U.S. 332, is mistakenly claimed to support this position. In the *Sands* case, the employees refused, at a time when their contract with the employer had more than six months to run, to continue work "in accordance with the provisions of the contract." 306 U. S. at 343. This Court upheld the propriety of the employer's action in discharging the employees "for repudiation * * * of [their] agreement." *Ibid.*

Sands does no more than establish that employees who refuse to work in accordance with the terms to which they have agreed for a specified time have broken their contract and may be discharged therefor. It does not support the Company's thesis that a strike for contract modifications is forbidden at a time when the parties, as in this case, have agreed that their contract should be opened for the purpose of negotiating modifications. As we have shown, *supra*, pp. 35–43, bargaining over contract proposals, whether during or at the end of the contract term, can be carried on in the manner contemplated by the Act only where there is the right to back bar-

gaining positions by the right to strike. The obligation of a contracting party not to strike which was recognized in *Sands* is thus only coextensive with the period for which the parties have agreed that the contract is not subject to alteration. The contrary view advanced by the Company negates the entire purpose of a reopening provision, which is designed to introduce collective bargaining between the parties. Accordingly, the simple but decisive difference between *Sands* and this case is that here the employees were acting within the contemplation of their contract, not in repudiation of it.

Even if it were to be conceded, moreover, that the strike was in breach of the existing contract, the Company would still not be entitled to immunity for the unfair labor practices found to have been committed by it. The right to discharge employees who strike in breach of their contract, as recognized in *Sands*, is premised upon the employer's legitimate interest in operating his business in accordance with an "employment contract * * * binding on both parties" which has been achieved through collective bargaining. 306 U. S. at 342. But this is not to say that an employer who chooses not to exercise that right may thereafter penalize his employees for engaging in otherwise protected activity. In brief, the employer's legitimate purpose of protecting his business interests against improper conduct cannot justify employer opposition to

lawful activities unrelated to the wrong which gave rise to the measure of protection thus afforded him. Accordingly, the employer faced with a strike in breach of contract may discharge the strikers for their breach, but if he elects to retain them as employees, he must treat them in accordance with the Act's provisions protecting the organizational rights of all employees.

The foregoing principle, implicitly recognized in the *Sands* opinion,[20] has long and uniformly been followed by the courts of appeals in cases where employees have engaged in unprotected activities in spite of which, for one reason or another, their employers continued their employment. The employers have not been permitted in these cases to resurrect as a justifiable ground for a subsequent discrimination or refusal to bargain the fact that the employees had engaged in unprotected conduct, even though that conduct gave the employers an option originally to terminate their employment.[21]

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[20] In treating the contentions in the *Sands* case that the strikers were discharged because of their union membership, and that some were offered reinstatement after the strike on discriminatory terms, the Court stated separate grounds for not finding unfair labor practices; it apparently assumed that the breach of contract was not a sufficient defense to these contentions. See 306 U. S. at 339–342, 345–346.

[21] *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 118 F. 2d 874, 885 (C. A. 1), certiorari denied, 313 U. S. 595; *National Labor Relations Board* v. *Highland*

In this case, the Company made no attempt to replace the strikers, and continued to negotiate with the Union, looking toward a new contract and settlement of the strike. Having thus chosen not to discipline its employees for their allegedly improper strike action, the Company was obliged to maintain the even handed treatment of its employees which the Act requires. Instead, as the Board found, the Company conditioned reinstatement of the strikers upon abandonment of "their adherence to the Union as their bargaining representative," and conditioned the execution of the agreement eventually reached with the Union upon the withdrawal of the unfair labor practice charge in this case. These requirements, which

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Shoe, Inc., 119 F. 2d 218, 222 (C. A. 1); *National Labor Relations Board* v. *E. A. Laboratories, Inc.*, 188 F. 2d 885 (C. A. 2); certiorari denied, 342 U. S. 871; *National Labor Relations Board* v. *Spiewak*, 179 F. 2d 695, 699 (C. A. 3); *National Labor Relations Board* v. *Wallick*, 198 F. 2d 477, 484 (C. A. 3); *Hazel-Atlas Glass Co.* v. *National Labor Relations Board*, 127 F. 2d 109, 118–119 (C. A. 4); *National Labor Relations Board* v. *Alabama Marble Co.*, 185 F. 2d 1022 (C. A. 5), certiorari denied, 342 U. S. 823, enforcing 83 NLRB 1047; *National Labor Relations Board* v. *Mt. Clemens Pottery Co.*, 147 F. 2d 262, 267 (C. A. 6); *National Labor Relations Board* v. *Aladdin Industries*, 125 F. 2d 377, 382 (C. A. 7), certiorari denied, 316 U. S. 706. Cf. *National Labor Relations Board* v. *Kaiser Aluminum & Chemical Corp.*, 217 F. 2d 366, 367–369 (C. A. 9); *United Electrical Workers* v. *National Labor Relations Board*, 223 F. 2d 338, 342–343 (C. A. D. C.). See, also, Note, 63 Yale L. J. 1186, 1191, 1195; Note, 46 Mich. L. Rev. 995, 999; Note, 22, George Wash. L. Rev. 248, 250.

constitute unfair labor practices,[22] were neither related to nor based on the alleged breach of contract, and thus cannot be excused even assuming there was such a breach.

Accordingly, whether or not the strike was in breach of the contract is an irrelevant issue in this case; the unfair labor practices found by the Board cannot be explained away irrespective of how that issue might be determined.[23]

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[22] The correctness of the Board's finding that, apart from the lawfulness of the strike, the impositions of these conditions violated Sections 8 (a) (1), (3), and (5) of the Act is well established. See, e. g., *Medo Photo Supply Co.* v. *National Labor Relations Board*, 321 U. S. 678, 683–685; *J. I. Case* v. *National Labor Relations Board*, 321 U. S. 332, 337–339; *National Labor Relations Board* v. *Swift & Co.*, 129 F. 2d 222, 223 (C. A. 8); *National Labor Relations Board* v. *American Mfg. Co.*, 106 F. 2d 61, 68 (C. A. 2), aff'd as modified, 309 U. S. 629.

[23] It may be questioned whether, assuming that the strike violated Section 8 (d), the loss of employee status provision in that Section would permit an employer to condition the reemployment of the strikers upon the discriminatory terms prescribed by the Company here. The court below tacitly assumed that failure to observe the requirements of Section 8 (d) relegates the strikers to an outlaw status and that the employer may condition their reemployment upon renunciation of rights which they otherwise have under the Act. The Board did not have occasion to determine whether Section 8 (d) works so severe a penalty. But see *United Electrical Workers* v. *National Labor Relations Board*, 223 F. 2d 338, 342–343 (C. A. D. C.), certiorari denied, 350 U. S. 981.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Sec. 151, *et seq.*) are as follows:

* * * * *

SEC. 8. (a) It shall be an unfair labor practice for an employer * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modification;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or

ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

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